

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/110/SM

In the complaint between:

JAMES JOHN THORNE Complainant

and

MEIHUIZEN PROVIDENT FUND First Respondent

MEIHUIZEN INCOME PLUS PLAN Second Respondent

LIBERTY LIFE Third Respondent

MEIHUIZEN FREIGHT (PTY) LTD Fourth Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction:

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956.

The complainant is Mr James John Thorne, who was employed by Meihuizen Freight (Pty) Ltd as a Groupage Clerk from 1 July 1988 until 30 November 1997 and was a member of the Meihuizen Provident Fund and the Meihuizen Income Plus Plan from 1988 until 1995.

The first respondent is the Meihuizen Provident Fund, a fund registered under the Pension Funds Act. The second respondent is the Meihuizen Income Plus Plan, which according to the rules of the Provident Fund, “provides benefits for Members in the event of their disablement”. The third respondent is Liberty Life, underwriter and administrator of first and second respondents. The Fourth respondent is Meihuizen

Freight (Pty) Ltd, a company duly incorporated with limited liability according to the company laws of the Republic of South Africa, and as stated was the former employer of the complainant.

The thrust of the complaint is the complainant's claim that he did not receive certain disability payments he alleges were owing to him over a period of 19 months. The complaint thus relates to the administration of a fund and the application of its rules; the complainant alleges that he sustained prejudice through the maladministration of a fund and that the decision of a fund to deny him the disability payments was an improper exercise of its powers.

After an exchange of correspondence between the parties, the complainant lodged a written complaint with the Pension Funds Adjudicator on 9 September 1998, having lodged same with the Provident Fund and the employer in compliance with Section 30A(1) of the Pension Funds Act. Submissions in response were received by the Adjudicator's office from Mr Julian Cloete of Liberty Life and from Mr Peter Buchanan representing the employer.

The third respondent has raised a question mark over the jurisdiction of this tribunal.

No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on supplementary information obtained from telephone conversations conducted with the parties by my senior investigator, Sue Myrdal. Ms Myrdal has furnished me a full report.

Having completed my investigation I have determined the complaint as follows. These are my reasons.

Background to the complaint

The complainant was diagnosed in 1992 as suffering from "bi-polar mood disorder – manic phase". In the ensuing years of his employment he frequently took paid sick

leave, and in February 1996 he was admitted to hospital for treatment of his condition. In his own words, he “absconded” on 5 February 1996 and did not complete his treatment or take his medication. On 22 February 1996 he was suspended by his employer on full pay and benefits, on the grounds of his behaviour at work, relations with clients and work performance. The employer’s letter of suspension made his reinstatement conditional on his returning to hospital and completing his treatment, and on his doctors furnishing a report confirming that he was able to resume his work duties.

The complainant was readmitted to hospital but in April the psychiatrist who treated him wrote to the employer recommending that the complainant “on the basis of intractable chronic mood disorder...be boarded permanently from work”. After consultation with the complainant, the employer applied to Liberty Life, administrators of the Provident Fund, on the complainant’s behalf, requesting his boarding on medical grounds and the payment of disability benefits. The application was in terms of Section 4 of the Rules of the Meihuizen Income Plus Plan, clause 2 of which reads as follows:

“A claim will be admitted when:-

- 2.1 The Member has been totally and continuously disabled and unable to follow his Normal Occupation for remuneration or profit for three months,
and
- 2.2 the disablement resulted solely and directly from an injury or disease.”

The Normal Benefit provided for in terms of the Rules is set out in the Schedule to the Rules as follows:

“75% of that part of the Member’s Plan Salary which does not exceed R2000, plus 55% of that part of the Plan Salary which exceeds R2000, subject to a maximum benefit of R4000 per month, less the contributions, if any, he would have made to the Employer’s retirement fund, had he not been disabled.”

with “Plan salary” being defined in the “Definitions” section as meaning:

“the monthly rate of fixed salary or wage being paid by the Employer to the Member as at the

Revision Date immediately prior to the date of disablement.”

The complainant claims he could get no information from the broker, the employer or Liberty Life as to what was transpiring with his claim but that he continued to receive his monthly salary while under suspension until the end of November 1997, when he was informed by his employer that from that time onwards Liberty Life would pay his disability benefit. The complainant states that he received the first of his (currently ongoing) disability payments from Liberty Life in December 1997. A month later he noted, on his Statement of Disability Income Benefits, that the “Effective Date of Admission and First Payment” was recorded as May 1996 (a three month waiting period from February to April 1996 was operable in terms of the rules). The complainant ascertained from Liberty Life that the first nineteen months (May 1996 to November 1997) of his disability payment had been paid as a lump sum to his employer, as a refund against the employer’s payment of his salary for this period.

The complainant contends that he received his salary because his suspension had never been lifted, nor had his employment been terminated, but that irrespective of this his claim for disability income benefits was admitted as from May 1996 and he should have received the benefits from that date – hence his complaint of maladministration and powers exercised improperly.

The respondents’ responses{tc \l1 "The respondents responses}

The responses from the respondents set out to provide an explanation for the apparently irregular state of affairs brought to light by the complaint.

The employer’s version is that the complainant had chosen to withdraw from the Provident Fund in late 1995 and that he had received a “refund” of contributions and interest, amounting to R13 365.39. (It appears from my discussion with Liberty Life’s Mr Julian Cloete that this withdrawal was permitted in error, since the complainant was still employed and no withdrawal benefit should actually have been payable.) At the time he applied to be boarded the complainant was therefore not, strictly speaking, a member of the Fund. The employer entered into protracted negotiations with the fund to find a

means of readmitting the complainant to the fund so that he could receive disability benefits and also so that he would be assured of a pension on attaining retirement age of 65, at which stage his disability benefits would cease. While these negotiations continued, the employer continued paying a salary to the complainant and contributed monthly to the Provident Fund on his behalf.

Towards the end of 1997 an agreement was eventually reached between the employer and Liberty Life whereby Liberty Life would accept the application for disability benefits if the complainant's original withdrawal benefit was repaid to the fund, along with contributions for the intervening period when he was not a member; the employer agreed to this provided that the benefits paid to the complainant from the effective date of boarding (1 May 1996) until the time payments were finally initiated from Liberty Life (1 December 1997) were refunded to the employer, less the amount of the withdrawal benefit.

The employer therefore received a refund from Liberty Life of:

Disability benefit (R2 500 x 19 months)	47 500-00
Less withdrawal benefit	-13 365-00

Net refund	R34 135-00

while having paid to the complainant some R22 000 in excess of this amount:

Salary 1 May 1996 – 31 March 1997	
(11 months x R2835)	31 185-00
Plus Salary 1 April 1997 – 30 Nov 1997	
(8 months x R3118-50)	24 948-00

	R56 133-00

Liberty Life confirmed the employer's version, and further noted that the employer was not obliged to continue to make payments beyond the expiry of the three month waiting period. That it had done so was "out of consideration for the employee's circumstances with the expectation that the claim would be admitted and that the proportionate refund would be made to them." Liberty Life's principal argument was that, while generally speaking, a member is entitled to the payment of benefits once the claim is admitted, "he should not be better off financially because of his disability, or the insured event."

The submission from Liberty Life's Mr Julian Cloete to the Adjudicator's office was however prefaced by the following assertion:

"The specific issue in question is subject to benefits payable by the Meihuizen Income Plus Plan which is not a registered Pension or Provident Fund and falls outside the jurisdiction of the Pensions Funds Adjudicator."

The other parties had at all times referred to the Provident Fund as the source of disability benefits and it appears that this jurisdictional issue had been obscured by their different understanding of the workings of the Provident Fund.

Before I may entertain the merits of this complaint, I am obliged to give consideration to the jurisdictional point raised by Mr Cloete.

The jurisdiction issue

The object of this office is "to dispose of complaints lodged in terms of section 30A(3) of the [Pension Funds] Act in a procedurally fair, economical and expeditious manner" (section 30D). Section 1 of the Act defines a "complaint" as "a complaint of a complainant relating to the administration of a *fund*, the investment of its funds or the interpretation and application of its rules..." The term "fund" is defined as a "pension fund organisation" and the term "**pension fund organisation**" is in turn fully defined to mean as follows:

- (a) any association of persons established with the object of providing annuities or lump sum

payments for members or former members of such association *upon their reaching their retirement dates*, or for the dependants of such members or former members upon the death of such members or former members; or

- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, *when they reach their retirement dates* or for dependants of such persons upon the death of those persons, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members. (my emphasis)

A careful reading of this definition establishes that the jurisdiction of this office is concerned with retirement fund disputes, and as Rosemary Hunter points out in her book *Retirement Fund Disputes*, (ENF Commercial and Financial Services (Pty) Ltd, 1998), “the definition does not appear to contemplate funds established with the object of providing compensation for the loss of income prior to retirement as a result of disablement.” While the definition does make provision for the inclusion of an association or business carrying on some of the business of friendly societies, such as providing disability benefits, this business must be “*in addition to* carrying on business in connection with any of the objects specified in paragraph (a) or (b)”, that is, the provision of retirement and death benefits.

Kobus Hanekom, in a discussion on the status of pension fund organisations under the Act in Volume 1 of the *Manual on South African Retirement Funds and other Employee Benefits*, at page 111, expands on this point:

Although the payment of benefits on permanent or temporary disablement in the form of either a lump sum or income benefits forms an integral part of members' needs, the Commissioner for Inland Revenue (CIR) has strict requirements in this regard. Retirement funds may only make provision for disability benefits if it coincides with early retirement i.e. due to ill-health – in other words, the disability would be of a total and permanent nature. As a result, disability income benefits are typically provided outside these funds in terms of loose standing disability income

insurance arrangements.

While the disability suffered by the complainant in this matter appears indeed to be of a total and permanent nature, and therefore of a nature that could well have been catered for by a provident fund, the fact is that the entire provision for disability income benefits has been arranged outside the Meihuizen Provident Fund, through the vehicle of the Meihuizen Income Plus Plan. It is clear that this vehicle is a benefit fund, as defined in the Income Tax Act, meaning a friendly society, a registered medical scheme, or “any fund (other than a pension fund, provident fund or retirement annuity fund) which ...the CIR is satisfied is a permanent fund, bona fide established for the purpose of providing sickness, accident or unemployment benefits for its members...”

(Section 1)

As I mentioned above, neither the complainant nor the employer seemed to be aware of this distinction. The complainant cited only the Provident Fund and the employer when lodging his complaint, and the employer’s Mr Peter Buchanan referred throughout his submission only to the Provident Fund, having stated at the outset that the Provident Fund “is administered by Liberty Life [and] also makes provision for death benefit and disability benefit.” Furthermore, the Statement of Disability Income Benefits provided by Liberty Life to the complainant through his broker makes no mention of any distinction between the Provident Fund and the Income Plus Plan. The heading and first paragraph of this document read as follows:

STATEMENT OF DISABILITY INCOME BENEFITS

NAME OF SCHEME	:	MEIHUIZEN PROVIDENT FUND
POLICY NO	:	36387
NAME OF CLAIMANT	:	J THORNE
EFFECTIVE DATE OF ADMISSION AND FIRST PAYMENT	:	MAY 1996

ADMISSION OF THE CLAIM

Liberty Life is pleased to advise that your claim has been admitted for disability income benefits under the above Policy, from the date shown. Please note that this benefit is not a pension which is being paid.

Apart from the observation in the last sentence there is no clue that the benefits were

actually being provided from a separate fund. Nevertheless a reading of the Rules of the Meihuizen Provident Fund and the (separate) Rules of the Meihuizen Income Plus Plan confirm that this was in fact the case.

The Foreword of the Meihuizen Provident Fund Rules describes the objective of the Fund as being “to provide benefits for Employees on their retirement and for their Dependants on the death of such Employees.” The section on benefits discusses retirement benefit, death benefit and withdrawal benefit, and then, under a sub-heading entitled “Plus Benefit”, states as follows: “If a member becomes disabled in terms of the Plan, he will be entitled to the Plus Benefit.” The “Plan” is defined in section 1A of the Rules as meaning “MEIHUIZEN INCOME PLUS PLAN which provides benefits for Members in the event of their disablement”.

The Rules of the Meihuizen Income Plus Plan do not specifically state the objective of the Plan, but it is clear from Section 4 dealing with benefits that the fund deals exclusively with disablement benefits, whether these be in relation to a total and permanent disability or to a temporary disability rendering the member unable to follow his or her normal occupation or any other occupation for which s/he is fitted for a period of time, thereby suffering a reduction or loss of income. Reference is also made to the “Termination Date” and/or date of cessation of claim, being the date upon which benefits would cease; this would generally be either because the member was no longer disabled or because s/he attained retirement date or received a retirement benefit “in terms of any retirement arrangement operated by his Employer” – further evidence that retirement funding is specifically excluded from the Income Plus Plan.

Both the Rules of the Provident Fund and the Rules of the Income Plus Plan incorporate sections entitled “Legal Status”, the wording in both cases being similar and unambiguous:

“Upon registration in terms of the Act the Fund shall become a separate corporate body and legal person distinct from its Members. The Fund shall be...capable in law of suing and being sued in its own name.”

“The Plan will be a separate corporate body and legal person distinct from its Members. The Plan will be capable in law of suing and being sued in its own name...”

It will be noted that in a previous determination, *Chambers v Fedsure Group Staff Income Security Scheme* (PFA/WE/4/98 decided on 11 May 1998), I assumed jurisdiction in respect of a disability fund. My ruling was challenged by the respondent in that matter and after consideration I rescinded the determination on the basis that the respondent, as an income security scheme, could not be considered to be a pension fund organisation, by the same reasoning as I have outlined above in this matter (see *Chambers v Fedsure Group Staff Income Security Scheme* PFA/WE/4/98 decided on 28 September 1998).

I am of the view, however, that a distinction may be drawn between that case and this. While it is clear that the Meihuizen Provident Fund and the Meihuizen Income Plus Plan are separate legal entities, the purpose of the Fund being the provision of retirement funding and death benefits and the purpose of the Plan being the provision of disability benefits, there is also a clear link between the two funds, and in fact a requirement that makes membership of the Plan conditional upon membership of the Fund, absent in the *Chambers* matter. The entitlement of a member to disability benefits in this case is in terms of the rules of the Fund. With regard to disability benefits, membership of the Fund is therefore a *sine qua non*; and the Plan providing disability benefits may legitimately, in my view, be seen as falling under the aegis of the Fund.

The administration of the Meihuizen Provident Fund in this matter incorporates, through its membership requirements, as well as the overlap in practical administration (as evidenced by the conflation of the Fund and Plan revealed by the Statement of Disability Income Benefits) the administration of a plan supplementing the benefits of the Fund.

I am therefore of the opinion that I am entitled to assume jurisdiction, on the basis that the complaint relates to the administration of a fund.

Analysis of the complaint

I can find no basis for a finding of maladministration in this matter. The employer continued to pay the complainant while negotiating with the Provident Fund on his behalf to re-establish his membership of the Provident Fund, so that he would be entitled to receive disability payments in the future and so that he would also be in a position to receive retirement benefits once he attained the retirement age of 65, at which stage the disability benefits would cease. Far from the complainant having sustained prejudice, he actually received payments from his employer well in excess of the amount due to him in terms of disability benefits. The Meihuizen Provident Fund, in readmitting the complainant to membership, and the Meihuizen Income Plus Plan, in admitting his claim for disability benefits, refunding the employer (to the extent of the amount due for disability benefits over the intervening period of 19 months) and thereafter timeously paying disability benefits directly to the complainant, have acted properly and in good faith.

Accordingly, I find that the complainant suffered no prejudice and the complaint is dismissed.

DATED AT CAPE TOWN THIS 23rd DAY OF APRIL 1999

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR